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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1075.

JACK PARKER, ISIDOR M. SAKS, MELVIN CAPLAN, DAVID WERTH, C. CLARENCE KASKEL, MORTON H. BARON, ROBERT HERMANN, SAMUEL OGUS, CHARLES MASLOW, GEORGE WILLETT, HARRY WIENER, CHARLES GOLDMAN, DAVID RUDBERG, WILLIAM I. HOHAUSER and SIDNEY MAYBAUM,

Petitioners,

vs.

PAUL A. PORTER, Price Administrator.

LANDLORDS' BRIEF, *AMICI CURIAE.*

LOUIS L. TETELMAN,
Attorney for Landlords, Amici Curiae.

THE COURT PRESS, N. Y. C.

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vs.

PAUL A. PORTER, Price Administrator.

LANDLORDS' BRIEF, *AMICI CURIAE.*

Statement.

Upon written consent of the parties, this brief, *amici curiae,* is filed on behalf of the landlords of the respective apartments in the building occupied by the petitioners as tenants.

Landlords wish to urge that this case does not present any question of sufficient importance or substance to warrant the granting of certiorari.

Facts.

Fifty-five Corporation, organized under New York laws, is the owner in fee of premises No. 55 Central

Park West, New York City (R. 3), on which stands a nineteen story residential apartment house, some of which apartments are occupied by petitioners (R. 4). These are luxury apartments in one of the finest residential areas of the city. Prior to February 17, 1945, two individuals, Victor M. Earle and Alexander B. Carver, planned to sell their entire capital stock holdings in Fifty-five Corporation cooperatively to any persons desirous of acquiring some of the apartments for their own use through proprietary leases (R. 7). At that time the Rent Regulation for Housing in the New York City Defense Rental Area, 8 F. R. 13914, did not contain any provision with respect to the percentage of total dwelling units in the cooperative which had to be purchased or held in order to obtain a certificate relating to eviction under Sec. 6(b)(2) of such regulation. On February 17, 1945, and while the cooperative was in process of organization, but before the landlords herein purchased their allotted stock and proprietary leases, the Rent Regulation was amended by the addition of Subparagraph (3) to Sec. 6(b), 10 F. R. 1973, so as to permit the issuance of a certificate, among other things, only when "* * * stock in the cooperative has been purchased by persons who are then tenants of at least 80% of the dwelling units in the structure * * *", Sec. 6(b)(3)(ii). The amendment left open the right to a certificate under 6(b)(2) if "* * * the cooperative was in the process of organization and the Administrator finds that substantial hardship would result from the failure to issue a certificate." Sec. 6(b)(3)(ii). Accordingly, Messrs. Earle and Carver requested a finding of hardship, resulting in the issuance of an interpretive letter by the Administrator on March 23, 1945, exempting the cooperative from the restrictions of Sec.

6(b)(3) (R. 8). In reliance on the Administrator's interpretive letter and without any knowledge whatsoever of anything that might have transpired before its issuance and in complete good faith and for value landlords herein purchased their respective apartments in the cooperative which went into effect on June 1, 1945.

Preliminary to the institution of dispossess proceedings in the local Court to obtain possession of their apartments upon termination of the tenants' leases, landlords filed their petitions in the Area Rent Office pursuant to Sec. 6(b)(2) of the regulation for a certificate authorizing each of them "to pursue his remedies for removal or eviction of the tenant in accordance with the requirements of the local law" (R. 9). The Area Rent Director ordered a hearing pursuant to the Revised Procedural Regulations 3, 9 F. R. 10484, at which tenants were invited to be and were present and represented by counsel and where a comprehensive record was made. The Area Rent Director denied the applications. Landlords thereupon filed a petition for review under the Revised Procedural Regulations with the Regional Director, who affirmed the denial below. Landlords thereupon filed their protest under the Revised Procedural Regulations and Sec. 203(a) of the Emergency Price Control Act with the Administrator in Washington, D. C. By order made on September 28, 1945, he granted the protest, reversed the decisions below and issued the certificates relating to eviction. The Administrator's opinion accompanying his order (reported, *In the Matter of Gordon et al.*, 3 Opinions & Decisions 3301, 9/28/45, Pike & Fisher—OPA Opinions and Decisions and to which the Court is respectfully referred) rejected both the charges of fraud

and misrepresentation levelled at the original stock owners relative to the antecedent interpretive letter and the claim of non-compliance with the regulations directed at the purchaser of the stock relative to their applications for the certificate.

Tenants then filed their protest with the Administrator, which was dismissed, followed by their filing of a complaint with the United States Emergency Court of Appeals, which was also dismissed, both for lack of jurisdiction (R. 10, 88).

Reasons for Denying the Writ.

Petitioners have neither been denied due process nor deprived of any basic right.

The fundamental purpose of the Emergency Price Control Act is declared in the Act and was fully considered in *Bowles* v. *Willingham*, 321 U. S. 503, where the Constitutionality of the Act was reaffirmed, following *Yakus* v. *United States*, 321 U. S. 414. To prevent inflation in our complex economy, Congress delegated the administration of the Act to an Administrator of the Office of Price Administration. To insure compliance with the commands of the statute and all rules, regulations and orders, Congress imposed civil and criminal sanctions. Enforcement was the keystone of the arch of the control structure. See, Inflation Control: The Enforcement Job, Paul L. Ross, Lawyers Guild Review, Vol. V, No. 6 (Nov.-Dec. 1945). The tenant, secure in his rights at local law, was not subjected to any restraints or sanctions. He was free to do as he pleased.

Sec. 203(a) says, "* * * any person subject to any provision of such regulation, order, or price schedule

may, in accordance with regulations to be prescribed by the Administrator file a protest * * *."

Nowhere under the Rent Regulation for Housing in the New York City Defense Rental Area, 8 F. R. 13914, is a tenant required to obey any provision. The regulation was framed as Congress intended that it should be.

> "Section 203(a) is designed to provide the advantages of a hearing, in a manner consistent with the need for expeditious determinations, to all persons who are required to obey the provisions of regulations or orders under Section 2." Sen. Rep. No. 931, 77th Cong. 2d Sess. (1942) 22.

The same report, after describing the procedure, continues:

> "Thus any person subject to any provision of any regulation or order issued by the Administrator under Section 2 has a right to object to such provision and a right to have his objections considered."

See also Sec. 204 of the Act, entitled, "Review" which is interlocked with Sec. 203.

Thus, it can be concluded that Congress intended to place a protective shield, through protest proceedings, around those required to comply with a possibly unreasonable or invalid regulation or order.

Reflective of such intention by the Congress are the statements contained in *Collins* v. *Porter*, No. 393, decided by this Court in the October Term 1945, April 22, 1946, wherein it was said:

> "His contention that the petitioner is not a 'person subject to - - - (the) regulation' Sec. 203(a)

> is amply refuted by the continuing liability of the petitioner, *United States* v. *Hark*, 320 U. S. 531."

and in *Thomas Paper Stock Co.* v. *Porter*, No. 578 and No. 67, decided by this Court in the October Term 1945, April 22, 1946, wherein it was said at the last page:

> "* * * that (meaning case No. 578) we now reverse with the result that disregard of the regulation based on standardized prices for waste-paper not 'determined' by the Administrator prior to September 11, 1943, does not subject petitioners to the penalties of the Price Control Act."

To say that Congress intended to extend the right to protest to every ultimate consumer and every tenant in a defense-rental area (millions of them) would be tantamount to asserting that Congress sought to nullify the purposes of the Act.

The reasoning in:

Buka Coal Company v. *Brown*, 133 F. 2d 949;

as reiterated in

Horns v. *Bowles*, 151 F. 2d 191;

relative to the original interpretation of the words "subject to" and the nature of protest procedure applies. In the latter case, at page 194, the Court said:

> "'In *Thomas Paper Stock Co.* v. *Bowles*, 1944, 148 F. 2d 831, 837, we said that the primary purpose of the protest procedure provided in

Sec. 203 of the Act,' 50 U. S. C. A. Appendix, Sec. 923,' is to afford to a person subject to a provision of a regulation or order which he believes to be invalid the opportunity to present his objections thereto to the Administrator and to request its modification or rescission *in order that he may not have to obey it in the future.*" (Italics ours.)

The Appellate Division of the Supreme Court, First Department, New York, had occasion to consider Sec. 203(a) in connection with a suit instituted in the Supreme Court by three of the petitioners herein to restrain their respective landlords from prosecuting their summary proceedings in the local Municipal Court to evict them following the issuance of the certificates by the Administrator:

> *Werth et al.* v. *Gordon et al.*, 270 App. Div. 255, 59 N. Y. S. 2d 99 (motion for leave to appeal to Court of Appeals denied 270 App. Div. 753).

In reversing the lower Court which had granted an injunction *pendente lite*, the Court said:

> "* * * We might add that it is even doubtful that the plaintiffs have any standing before the Emergency Court of Appeals. Under the OPA legislation the only person who may appeal to the Emergency Court of Appeals is one who is aggrieved by the denial of his protest by the Administrator, and the only person who may file a protest with the Administrator is one who is 'subject to any provisions' of a regulation or order of the OPA (Sec. 203(a), Emergency Price Control Act, Tit. 50 U. S. C. A. Appendix Sec.

923(a)). As the landlord, rather than the tenant, is subject to the provisions of the OPA, the plaintiffs would appear not to have any standing to protest the Administrator's order or appeal to the Emergency Court of Appeals."

Pursuant to the delegation of power in Sec. 203(a) of the Act, the Administrator promulgated Revised Procedural Regulation No. 3, 9 F. R. 10484, prescribing rules for adjustments, amendments, protests and interpretations under the maximum price regulations. Nothing in this regulation impinges upon or deprives a tenant of any right. Since landlord had to comply with the rent regulations he was the one accorded the right of protest, Sec. 1300.216. As an aid to the Administrator in making his investigations and determinations, tenants were permitted to present applications, but they were entertainable only at the discretion of the Administrator. Sec. 1300.205. The procedural regulation does not arrogate to itself any greater right or power than is permitted by the Act itself.

In:

National Labor Relations Board v. *Mackay Co.*, 304 U. S. 333, 351,

it was said:

"The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights."

Petitioners, in support of their contention that a tenant is subject to the Act, on page 17 of their petition, snatch from its context the words "to those

affected" from the opinion of the late Mr. Chief Justice Stone in:

Yakus v. *United States*, 321 U. S. 414, 433,

to indulge a connotation not intended by the opinion. When the Chief Justice wrote that opinion he wrote it in the setting of the Emergency Price Control Act. That Act imposes penalties for violation of its provisions or regulations or orders thereunder. It imposes penalties solely on persons prohibited from acting or required to act. These are the persons affected —not tenants who cannot violate. It is submitted that there is no substance whatever to the argument along this score. True, the acts of the Administrator are subject to review, but only such acts as the statute intended to be reviewed, not every act.

Petitioners, in further support of the latter contention, at top of page 19 of the petition quote from one of the stated policies in House Bill No. 5990:

> "(11) the protection of the interests of those subject to the Act by providing procedure for administration and review."

The significance, if any, of this quotation would appear to be dissipated since the conference agreement between the Senate and the House "omits the purposes of the House bill described above in * * * (11)" (p. 661).

On pages 19, *et seq.*, petitioners quote from certain statements made in Congress at the time of the consideration of the enactment of the Emergency Price Control Act. When Congressman Steagall stated that "The provision also gave anybody dissatisfied with an order, ceiling or regulation of the Administrator the right to appear and protest the action of

the Administrator", he had reference to anybody within the ambit and provisions of the Emergency Price Control Act. He had reference to the terms of the Act, that is to say, persons "subject to" the Act.

On page 20, petitioner quotes a statement by Congressman Pheiffer of New York, whereas the record reveals that Congressman Williams of Missouri made it. The same observation as to Congressman Steagall's statement, *supra*, applies to this one.

Petitioners' contention, that the Act conferred a vested right upon them as tenants, is well answered by the learned opinions of Chief Judge Maris (R. 74) and Judge Magruder (R. 78) in the United States Emergency Court of Appeals.

Every substantive possessory right has been retained by the tenant.

The most that petitioners can say is, that because of the restriction imposed by the regulation upon the landlord through the creation of the defense rental area, the time when the landlord could institute his eviction proceedings has been extended until he shall have obtained a certificate or the defense rental area abolished. This is a procedural or remedial aspect, at most, not substantive.

Bowles v. *Willingham*, 321 U. S. 503, 519,

has determined that the Act did not clash with the Fifth Amendment because it did not provide for a hearing to landlords in advance of the administrative creation of a defense rental area. Certainly, a tenant, who is not subject to the civil and criminal sanctions of the Act should not be heard to complain if the defense rental area is eliminated without notice to him.

Mr. Justice Rutledge in his concurring opinion in *Bowles* v. *Willingham*, stated at page 522:

> "* * * The power to specify defense rental areas, rather than amounting to an excess of permissible delegation, is actually a limitation upon the administrator's authority, restricting it to regions where the facts, not merely his judgment, make control of rents necessary both to keep down inflation and to carry on the war activities concentrated in them."

Since the Administrator has the power to further attenuate his sway over defense rental areas through exceptions in the regulations, as ruled in

> *Taylor* v. *Brown*, 137 F. 2d 654, certiorari denied 320 U. S. 787,

it would follow that the time when and the circumstances where he so acts should be solely his concern.

Sec. 4(d) of the Act provides:

> "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodation for rent."

This evidences a Congressional intent to fully preserve the landlord's possessory right, rather than grant any greater right to the tenant than he had at local law in the first instance.

As decided in:

> *Snyder* v. *Reshnik*, 131 Conn. 252, 38 A. 2d 803,

quoted in the dissenting opinion of Judge McAllister (R. 85, 86), and page 33 of the petition, under local

law the Courts insist upon proof by the landlord of his good faith in obtaining the certificate of eviction for his own occupancy. So that, the tenant is not only protected by the Administrator standing guard over the tenants and ultimate consumers in his stupendous task of endeavoring to stabilize the economy, but the tenant is further protected by the local Courts. The rule in *Snyder* v. *Reshnik*, above, is applied in the New York Courts.

The New York Courts further protect the tenant through the granting of stays of execution of the warrant of eviction in meritorious cases (Sec. 1436-a Civil Practice Act, Laws of 1930, Chapter 820). It would therefore appear unnecessary for the Federal Government to extend its authority over a domain well capable of protecting the possessory rights of the tenant, *i. e.*, over the right to possession of property by a dweller where the state has ample means and power to do so.

The petition reiterates observations of alleged elements of fraud and misrepresentation as though they were an issue which might prompt this Court to entertain this petition in the absence of a meritorious point of substance or importance. In some places the petitioners accuse the purchasers of having indulged in fraud and misrepresentation either in procuring the original interpretive letter from the Administrator, or the later certificates of eviction. On page 3, paragraph 5, petitioners say "that the purchasers' application to evict petitioners was based on fraud and misrepresentations." On page 26 petitioners say "in the face of contentions that such order was procured by fraud." In other places petitioners imply similar accusations;—petition page 5, line 24; page 24, line 18 *et seq.*, page 29, line 23. The allegations of fraud

and misrepresentation were directed at the original owners of the stock when they obtained the original interpretive letter. As to that, the Administrator ruled that there was no fraud. He stated that the landlords herein purchased their stock and acquired their proprietary leases in reliance upon the interpretive letter issued by the Administrator. See 3 Opinions and Decisions 3301, 9/28/45 Pike & Fisher, OPA Opinions and Decisions.

Petitioners on page 9 of the petition state in reference to the opinion of Judge Magruder that "The concurring opinion, rendered 'with some hesitation' ". Judge Magruder concurred in the decision with a very strong opinion and did not render his opinion "with some hesitation". He said "with some hesitation I concur in the opinion by Chief Judge Maris" (R. 78).

The dissenting opinion of Judge McAllister (R. 84) makes reference to helplessly stricken invalids, newly returned veterans of the war, children and aged people who would suffer by the issuance of the certificates in this case. The petitioners, at the bottom of page 12 and on page 13 of the petition, quote this observation of Judge McAllister, although the petitioners well know that such is not the case and the record contains no such allegation.

Petitioners on pages 14 and 15 of the petition seek to weaken the significance of the interpretation of the phrase "subject to" by making certain references to a regulation adopted by the Administrator having no relevancy to the regulation in this case (Revised Procedural Regulation No. 1, Sec. 1300.24; 7 Fed. Reg. 8961), and reference to a decision of the Emergency Court of Appeals. *Illinois Packing Co.* v.

Snyder, 151 Fed. 2d 337. These were referred to and considered by Chief Judge Maris in his opinion (R. 75), and by Judge McAllister in his dissenting opinion (R. 82 and 83). Examination of these two variances from the customary practice of the Administrator and from the express provision of the Act, Sec. 203(a), do not, it is submitted, weaken the meaning of the Act.

It is submitted, that within the purview of the statute and appropriate reasonable regulations, and in the light of the conduct of the Administrator in giving the tenants an opportunity to present all the information possible to guide him in making his decision as to whether or not he would relieve the landlords from the onus of the regulation, no conceivable right of the tenant was invaded nor any vestige of due process denied said tenant, and consequently no question of great importance has been presented on this application for a writ of certiorari to the United States Emergency Court of Appeals.

The Administrator and the United States Emergency Court of Appeals were both correct in concluding that the tenants in this case had no standing whatsoever to file a protest within the meaning of Sec. 803(a) of the Emergency Price Control Act.

CONCLUSION.

Therefore, it is respectfully submitted that the petition herein for a writ of certiorari should be denied.

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